McGuigan, David

From: Lynn Buhl -MDE- <lynn.buhl@maryland.gov>
Sent: Friday, April 01, 2016 10:35 AM
To: McGuigan, David; gleasoon.patricia@epa.gov
Cc: Paul DeSantis; Brian Clevenger; Raymond Bahr; Jennifer Smith -MDE-; Virginia Kearney; Ed Stone
Subject: Memo re Nutrient Trading in Maryland MS4 permits
Attachments: Memo to Buhl- Nutrient Trading within MS4 permits- FINAL.doc; Memo to Buhl- Nutrient Trading within MS4 permits- FINAL.pdf

As you requested - in both WORD & PDF.

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MEMORANDUM

Confidential Attorney/Client Privileged Communication

TO: Lynn Buhl, Director
Water Management Administration
Maryland Department of the Environment

FROM: Paul N. De Santis
Assistant Attorney General

RE: Framework for Nutrient Trading within the MS4 Permit Structure

DATE: April 1, 2016

The Environmental Protection Agency, Region III, has requested that the Department present a legal argument that nutrient trading is authorized within the confines of the existing Phase I MS4 permit structure. This memo presents that legal argument.

I. The Permit Template

The Department has consistently argued that the Phase I MS4 Permit template complies with the CWA requirement to control stormwater discharges to the maximum extent practicable. 33 U.S.C. § 1342(p)(3)(B). Nonetheless, the Department has set a more specific pollutant reduction goal for urban stormwater discharges as part of the Bay TMDL that is not limited by practicability. The Department, at Part IV.E.2.a of the permit template, established an additional effluent limit whereby each jurisdiction must restore, within the next 5 years, 20% of its impervious land that does not control stormwater discharges to the maximum extent practicable. The permit template at Part VI.A, explains that this effluent limit adheres to the pollution reduction strategy set forth in the Department's Bay TMDL WIPs and will also make progress toward the goal of addressing local TMDLs. Indeed, EPA, in a November 26, 2014 memorandum, recognized that the 20% restoration requirement was a water quality-based effluent limit. As such, the restoration requirement goes beyond a technology-based standard that considers practicability. The permits specifically note, "Lack of funding does not constitute justification for noncompliance with the terms of this permit." See Permits at Part IV.G.2. Consequently, the Department recognizes that compliance with the terms of

this water quality-based limit may be impracticable for jurisdictions to meet and thus, it may exceed the MEP standard.

Moreover, the Department's *Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollutant Discharge Elimination System Stormwater Permits* (the "Guidance Document"), sets forth strategies that relate to the Bay TMDL and *not* local impairments for metal or toxics associated with urban stormwater discharges. The Guidance Document permits jurisdictions to use "Alternative BMP Credits" that include strategies such as stream restoration, outfall stabilization, shoreline management, septic pumping, septic denitrification, and septic connections to wastewater treatment plants. These strategies address nutrient and sediment removal, *not* the treatment of urban stormwater for other pollutants that may be impairing local waters.

The 20% restoration requirement, is thus, separate from the requirement that jurisdictions eventually "attain" all wasteload allocations set forth in local TMDLs. Although the 20% restoration requirement complies with the Bay TMDL strategy, the permits require jurisdictions to submit additional restoration plans articulating how they will implement control measures to eventually attain all wasteload allocations. These restoration plans must include deadlines for attainment, but the Department has recognized that these plans are part of the ongoing iterative process. Accordingly, the permits establish a system of adaptive management where the jurisdictions must continuously reassess the effectiveness of their strategies to reduce pollutant discharges, determine what additional practices or programs will be necessary to meet established wasteload allocations, and modify their plans in an effort to address those changes. This adaptive approach is anticipated to take several permit terms for all MS4 jurisdictions.

II. Argument

The permit template supports the notion that the 20% restoration requirement is based upon the Bay TMDL and not local water quality. Although the use of structural urban stormwater BMPs may provide local water quality benefits, the stated goal is to comply with the Bay TMDL strategy. Moreover, as EPA itself has recognized, the 20% restoration requirement is a water quality-based effluent limit, and as such, it is not confined to concepts of practicability.

With this understanding, nutrient trading within the confines of the existing Phase I MS4 permits is an appropriate strategy to comply with the Bay TMDL 2017 interim target reductions. Although nutrient trading is not specifically authorized in the Department's Guidance Document, that guidance is broad enough to allow for the use of nutrient trading. The Guidance Document "recognizes that new and innovative approaches to stormwater management are being developed on a continuous basis." (Guidance Document at p. 22.) The Department has set forth a means by which innovative practices that have not been approved by the Department or the Chesapeake Bay Program can still be utilized by jurisdictions to meet their restoration goals when the jurisdiction can provide proper documentation to verify removal efficiencies. *Id.* 22- 23. This provision provides flexibility to include approaches such as nutrient trading through

the use of agricultural BMPs. Indeed, the agricultural BMPs used to establish nutrient trades have been approved by the Bay Program, and have well-established removal efficiencies.

Although EPA Region III has argued that agricultural BMPs cannot be used towards meeting the 20% restoration requirement because they do not address urban stormwater or local water quality impairments, the restoration requirement is based upon the Bay TMDL. This requirement is separate from the requirement that jurisdictions must submit plans to meet WLAs and address local TMDLs. The Court of Appeals stated, "We stress that this requirement [to submit restoration plans] is distinct from the 20% restoration requirement." *Id.* slip op. at 45 n. 52. The Court concluded:

> We further disagree with the Water Groups' position that the 20% restoration requirement is insufficient because it does not relate to other TMDLs. Indeed, the Permits incorporate a requirement to submit plans regarding WLAs for all EPA-approved TMDLs. That requirement ensures that Permits address all applicable TMDLs.

Id. slip op. at 41.

III. Conclusion

Consequently, the use of nutrient trading will not affect an MEP analysis for two reasons. First, innovative approaches are incorporated into the Department's existing strategy. The use of nutrient trading as an innovative approach will be accomplished through agricultural BMPs that have been approved by the Bay Program, and have well-established removal efficiencies. Second, the Department has recognized that the 20% restoration requirement is a water quality-based effluent limit that goes beyond MEP. Additional flexibility should not affect this analysis, but to the extent that EPA believes that it does, the changes are designed to make requirements practicable for permittees to meet within this permit term.

For the reasons stated above, the use of nutrient trading is implicitly authorized within the current construct of Maryland's Phase I MS4 permits. The use of nutrient trading to meet the 20% restoration requirement will not require a modification to these permits that trigger further public participation requirements.